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DIGEST

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**UNITED STATES MERIT SYSTEMS
PROTECTION BOARD**

Washington, D.C. 20419

United States Merit Systems Protection Board

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CASE SUMMARIES

ADVERSE ACTIONS

PHILLIP C. ALVARADO v. U.S. POSTAL SERVICE

(Docket No. SL075299002REM)

February 24, 1983

3.130; 3.1321; 3.133*

Appellant was continually absent because of a physical impairment and thus failed to meet his work schedule. Consequently, the agency removed him from the position of mail handler, the Board's presiding official sustained such removal, and appellant petitioned for review. In an order issued September 16, 1981, the Board agreed with the presiding official that appellant's two-year absence justified the agency's action. Nonetheless, the Board remanded the case to the regional office to consider whether the agency discriminated against appellant on the basis of physical handicap and whether the agency violated the National Agreement, an agreement between postal unions and the Postal Service.

In a second initial decision, the presiding official found that the agency did not violate the National Agreement. However, the presiding official did find appellant to be a "qualified handicapped person," according to 29 C.F.R. §1613.702(f) and determined that with reasonable accommodation, appellant could safely perform several duties of the mail handler position. Finding that the agency failed to accommodate appellant's handicap and thus discriminated against him, the presiding official reversed appellant's removal.

In a petition for review, the agency contended that appellant did not show that he was a qualified handicapped person and that the agency could not accommodate appellant without burdening the operation of the agency. According to the record, appellant's impairments were diagnosed as arthritis, phlebitis, and severe back pain, and appellant's doctor advised him against lifting more than 30 pounds and standing for extended periods. Though appellant contended that he was able to perform certain tasks of the mail handler position, testimony presented by the agency indicated that the duties appellant specified often involved lifting items weighing more than 30 pounds, as well as standing for long periods. The agency con-

tended that there was not enough work involved in the duties appellant specified to establish a permanent light duty assignment for him.

The Board agreed with the presiding official that appellant was clearly handicapped. The Board explained, however, that in order for appellant to be a "qualified handicapped person," he must show "that he can perform the essential functions of the position in question, with or without reasonable accommodation by the agency without endangering the safety of himself or others." The Board noted appellant's request that his job be modified to include only the duties he specified, but determined that even the lighter tasks would require lifting and standing that were, according to his doctor, beyond appellant's capabilities. Therefore, the Board found appellant unable to perform the duties of the position, with or without reasonable accommodation. Determining that the agency did not discriminate against appellant for physical handicap, the agency reversed the second initial decision regarding cancellation of appellant's removal and affirmed as modified the remainder of the decision.

MICHAEL ANDRUS v. INTERNAL REVENUE SERVICE (Docket No. SF07528111099)

February 8, 1983

1.321; 1.400; 1.410; 14.700

Appellant was demoted from the position of files supervisor for striking a subordinate. According to the record, appellant went to a tavern to confront the employee, who was absent without leave (AWOL). While discussing the absence on the tavern's parking lot, appellant and the other employee got into a fight. Appellant, throwing the first blow, struck his subordinate in the face. Upon appeal, the Board's presiding official found the penalty of demotion appropriate. Consequently, appellant petitioned for review.

Although the Board found appellant's offense serious in light of his supervisory role, the Board stated that several mitigating factors warranted its attention. The Board noted appellant's testimony that the other employee provoked him by moving toward him and taunting him. The Board further noted that the other employee was in an unpredictable semi-intoxicated state. Because the incident occurred off-duty—in-

* For an explanation of key numbers, see "Index."

stead of in front of other employees in the workplace—the Board determined that appellant did not compromise the supervisor-subordinate relationship by his actions. Moreover, the Board pointed out that appellant and the other employee, who were friends, both testified that they considered the incident minor. The Board also pointed out that appellant suffered most from the fight, sustaining a broken nose.

The Board also discussed the point that appellant could not guarantee that he would never again act as he had if he continued to be in a supervisory position. The Board agreed with appellant that such a guarantee was virtually impossible to give. Noting that the matter of the guarantee was relevant to whether appellant could be rehabilitated, the Board pointed out that appellant had an excellent service record with the agency of more than 10 years. The Board, stating that it generally finds "a suspension to be appropriate in cases involving physical altercations which do not involve the inflicting of injury and the use of weapons," found the penalty of demotion unreasonable and substituted a 30-day suspension. Accordingly, the Board reversed the initial decision and ordered the agency to cancel the demotion.

JAMES BARRY v. DEPARTMENT OF THE NAVY

(Docket No. AT07528110768)

February 22, 1983

1.311; 1.420; 3.1321; 10.133; 14.110

Appellant, a production controller, was removed for excessive absence without leave (AWOL). The presiding official reversed the removal, finding that because appellant was suffering from psychological problems at the time of his absence, he was entitled to be placed in a leave status other than AWOL. The agency petitioned for review, contending that the presiding official misapplied *Zeiss v. Veterans Administration*, 7 MSPB 516 (1981), and erred in not finding alcohol abuse the reason for appellant's absence.

According to the record, appellant first used sick leave to cover his absence, then annual leave, and finally was carried as AWOL. He reported almost every morning that he would not be in. When appellant returned to work after a hospital stay, the agency sent him home because he had not obtained a release from his physician. The agency also directed him to file for disability retirement and placed him on leave without pay (LWOP) while his retirement application was pending. When his supervisor requested medical evidence of his illness, appellant obtained documentation of his hospitalization, and the agency converted the period of leave covering his hospital stay to LWOP. However, since appellant failed to produce

evidence substantiating his other days of absence, the agency converted his previously approved leave to AWOL and proposed his removal. Appellant then procured letters from the pastor and deacon of his church confirming that he was ill before he actually entered the hospital. Appellant also submitted non-medical evidence to show that he was too sick after his release from the hospital to report to work. The agency found appellant's evidence unacceptable and therefore removed him.

The Board reviewed the agency's instructions for employees regarding leave, which provided that an employee who notifies his supervisor that he is ill should be placed on sick leave until he submits an application for such leave, as well as substantiating evidence. The instructions explained that if sick leave is unavailable, the employee is to be placed on annual leave or LWOP if neither sick nor annual leave is available. The Board pointed out that the instructions did not provide for placement in an AWOL status. Further, the Board noted that the agency's instructions called for more than three days of sick leave to be substantiated by a medical certificate or "the employee's signed statement explaining the nature of the illness . . . when it is unreasonable to require a medical certificate."

In discussing the application of *Zeiss* to appellant's situation, the Board explained that *Zeiss* differed from appellant's case in that before the employee in *Zeiss* was removed, he submitted no evidence to substantiate his illness. Also, unlike appellant, he never contacted his agency during his illness. The Board stated that in appellant's case, the agency should have construed the information appellant obtained from his pastor and deacon as a request for approved leave. Considering the testimony of appellant's psychiatrist and the information appellant submitted to justify his absence, the Board found it unreasonable for the agency to have placed appellant in an AWOL status both during the period before his hospitalization and during the two days following his hospitalization. Further, the Board agreed with the presiding official that alcoholism was not the reason for appellant's absence during the period in question. Accordingly, the Board affirmed the initial decision as modified and ordered the agency to cancel appellant's removal.

AARON M. FARRIS v. U.S. POSTAL SERVICE

(Docket No. AT0752811012)

February 22, 1983

1.360; 1.363; 1.367; 1.370; 1.3711; 1.410; 1.512;
2.300; 2.311; 4.121; 4.310; 7.000000; 10.1211;
10.1214

The agency imposed an emergency suspension, then removed appellant for distributing a flyer criticizing postal management and for belligerent and threatening behavior towards a management official during a grievance session. When appellant appealed to the Board's regional office, the presiding official found that appellant was within his First Amendment rights in handing out the flyer. Moreover, the presiding official determined that appellant's exercise of "free speech" did not affect his discharge of his duties or the operation of the agency. The presiding official did not sustain the agency's first charge against appellant and thus reduced the penalty to a 45-day suspension.

In its petition for review, the agency argued that had the presiding official allowed it to ask appellant certain questions about the flyer, the presiding official might have reached different conclusions. Specifically, the agency hoped to establish that appellant's assertions in the flyer were made with "reckless disregard for the truth." The Board explained that the "free speech" question as applied to appellant's case was not whether the speech was true or false, but whether it disrupted the employment situation. Noting that the record did not indicate that the contents of the flyer were untruthful, the Board stated that it failed "to see how further questioning of appellant would have relevance to the truth or falsity of his claims." Thus, the Board did not sustain the agency's charge regarding the flyer.

The Board considered the emergency suspension the agency imposed in appellant's case and found it invalid. The Board pointed out that the agency, in violation of 5 U.S.C. §7513(b)(1), gave appellant less than 30 days notice of his suspension. Citing *Cuellar v. U.S. Postal Service*, MSPB Docket No. SF075299045 (November 13, 1981), the Board noted that because the agency had no cause to believe that appellant committed a crime for which a sentence of imprisonment could be imposed, it acted wrongly in imposing an emergency suspension and thus committed harmful error.

The Board also addressed appellant's contention that his behavior in the grievance session was a protected activity under the National Labor Relations Act. The Board found this argument to be without merit, explaining that while employees generally may not be discharged for impertinence in presenting grievances, such protection does not extend to employees who are grossly insubordinate or who threaten physical harm. In appellant's case, the Board found his misconduct—which included name calling directed at a management official, threats of physical abuse, and blocking the official's exit from the room—to be severe and thus beyond the protection of the National Labor Relations Act.

The Board considered appellant's point that the agency failed to establish nexus between his conduct and the efficiency of the service because he was off duty and on administrative leave during the grievance session. The Board disagreed with appellant's argument, noting that appellant was on agency premises when he exhibited the poor behavior and that his misconduct directly involved his supervisor. Thus, the Board found that appellant jeopardized the supervisor-employee relationship and found nexus established.

Regarding the penalty, the Board agreed with the presiding official that the agency's penalty of removal should be reduced to a 45-day suspension. The Board pointed out that only one of the agency's charges was sustained. Moreover, appellant showed that in the past, the agency had imposed either a seven-day or fourteen-day suspension for similar conduct. The Board further noted that no physical harm resulted from appellant's behavior and that the incident occurred in an isolated room unobserved by other employees. Accordingly, the Board ordered the agency to cancel the emergency suspension and the removal and to substitute a 45-day suspension.

JAMES L. McPARTLAND v. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION (Docket No. DA075281F1018)
February 8, 1983

1.311; 1.400; 4.125; 4.130; 4.210; 8.380; 10.1215

Appellant was removed from the position of air traffic control specialist for participating in a strike against the government and for unauthorized absence. Appellant appealed his removal to the Board's regional office, contending that his leave was authorized, that the agency did not properly notify him that his leave was cancelled, and that the agency violated the collective bargaining agreement between itself and the Professional Air Traffic Controllers Organization. The presiding official sustained appellant's removal, and appellant petitioned for review.

The Board addressed appellant's argument that the presiding official erred in finding that appellant participated in the strike, Citing *Schapansky v. Department of Transportation*, MSPB Docket No. DA075281F1130 (October 28, 1982), the Board explained that "an agency may establish a *prima facie* showing of an employee's participation in a strike by proving . . . that an employee's absence from duty during a strike was unauthorized." Regarding appellant's leave, the presiding official determined that the agency had informed appellant in writing and verbally that his annual leave was cancelled if a strike

occurred. Considering the presiding official's determination, which was based upon hearing testimony, the Board found appellant's absence from duty during the strike unauthorized.

The Board considered appellant's contention that the agency violated the collective bargaining agreement which provided that the agency may cancel or reschedule annual leave only in the case of an "operational emergency." Appellant interpreted the agreement as requiring formal announcement of the emergency and believed that the emergency must have occurred before the agency could cancel or reschedule leave. The Board disagreed with such interpretation, finding that the agreement required "only the existence or reasonable likelihood of the existence of an operational emergency" before the agency could cancel leave. Moreover, the Board found that the strike at the facility where appellant worked clearly constituted an operational emergency since, according to the record, only half of the staff reported for duty, requiring the facility to reduce its operating hours significantly.

The Board also considered appellant's argument that by informing him that his leave would be cancelled in the event of the strike, his superiors violated a portion of the collective bargaining agreement which prohibited approval of leave "subject to conditional circumstances." The Board found such argument to be without merit and noted that "insofar as [the agreement] permits cancellation of annual leave in the event of an operational emergency, an agency's approval of such leave is always implicitly conditional." The Board interpreted that provision of the collective bargaining agreement to pertain to leave in circumstances other than an operational emergency. Accordingly, the Board could not find that the agency violated the agreement, and determined that appellant failed to rebut the *prima facie* showing that he participated in the strike.

The Board considered the appropriateness of the penalty. Though it noted appellant's previously unblemished work record, it pointed out that in *Schapansky* it held that despite a clean employment record, the penalty of removal for a striking air traffic controller was not excessive, considering the gravity of the offense and the effect of such conduct on the agency's operation. Accordingly, the Board affirmed the initial decision as modified.

GEORGE K. MAJOR v. DEPARTMENT OF THE AIR FORCE (Docket No. DA07528110572)

February 4, 1983

1.343; 1.400; 1.420

Appellant was removed from the position of data transcriber for falsifying a doctor's statement and for unauthorized absences. In taking its action, the agency considered that appellant had previously been suspended for three days for possession of marijuana. When appellant appealed the removal, the presiding official reduced the penalty of removal to a 30-day suspension, and the agency petitioned for review.

The agency, in its petition—as well as the Office of Personnel Management in an intervenor brief—questioned the presiding official's judgment in mitigating the penalty. Citing *Douglas v. Veterans Administration*, 5 MSPB 313 (1981), the Board explained that it has the authority to mitigate a penalty "when it determines that the agency failed to weigh relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness." The Board discussed the presiding official's reasons for finding that removal was an inappropriate penalty. The Board noted the presiding official's determination that the agency's basis for appellant's removal was its belief that appellant could not be rehabilitated. It also noted the presiding official's reasoning that the suspension for possession of marijuana did not involve behavior that was related to charges of falsification or unauthorized absences and that appellant's unresponsiveness to counseling for job performance did not indicate that he could not be rehabilitated for falsifying medical documents.

The Board noted the agency's allegation that the presiding official erred when she gave less consideration to appellant's prior disciplinary record because she found the offenses to be dissimilar. It considered the seriousness of appellant's offenses and noted that his falsification of the medical statement was intentional. The Board also pointed out that appellant's conduct brought his honesty into question and that his overall work performance was deficient. The Board, citing *Johnson v. Department of the Air Force*, Docket Number DA07528090155 (February 25, 1982), stated that "determination of the appropriate penalty for a current charge of misconduct may include consideration of prior discipline for unrelated charges." Pointing out that appellant had been repeatedly counseled for poor performance, the Board found that he showed no potential for rehabilitation. Finding the penalty of removal appropriate, the Board reversed the initial decision and sustained the agency's action.

PEGGY F. NICHOLSON v. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Docket No.

DC07528110516)

February 8, 1983

1.363; 1.400; 4.210; 4.320; 10.12111; 10.12112;
10.1212; 14.700

Appellant, a clerk-typist, was suspended for 30 days for insubordination and for conduct unbecoming a government employee. When appellant appealed to the Board's regional office, the presiding official found the agency's charges unsupported and therefore reversed the suspension.

In a petition for review, the agency contended that since appellant failed to appear at the hearing, the presiding official should have dismissed the appeal "for failure to prosecute." The Board explained that although it may dismiss an appeal when a party fails to prosecute such appeal, it has held that when a party fails to appear at a hearing, the presiding official may decide the case on the record. Noting that the agency could have gone on with the hearing despite appellant's failure to appear, the Board determined that the propriety of the initial decision was not affected by appellant electing not to attend the hearing. The Board added that the presiding official had extensive evidence submitted by the parties on which to base his decision.

In its petition, the agency addressed the presiding official's findings on several of the specifications of the insubordination charge, including one specification regarding appellant's unwillingness to mail requests for proposals. According to the record, when a contract specialist asked appellant to mail proposals, appellant replied that she had to process the mail first. The presiding official found no indication that the contract specialist directed appellant to stop processing the mail and work on the requests for proposals. The Board agreed with the presiding official that appellant was not insubordinate in this instance. The agency also questioned the presiding official's finding on another specification, which involved appellant telling a caller that an employee was not in the office—though she knew he was—and also telling the caller her name was "Lori." The Board pointed out that although evidence indicated that the call did take place, there was no evidence to show that appellant was the person who actually took the call. The agency also questioned the presiding official's finding about the specification that appellant told a caller that she would not look for the employee with whom the caller wished to speak, and then hung up. Again, the Board agreed with the presiding official's finding that the agency's evidence was insufficient to establish that appellant answered the call in question.

The Board considered the agency's charge that appellant behaved in a manner unbecoming a government employee. The agency specifically charged that appellant put mail in a trash can. Noting that no eyewitnesses came forward to confirm the incident, the

Board found that the presiding official acted properly by not sustaining the charge.

Since the presiding official sustained only one of the specifications of the insubordination charge, the Board found that the presiding official erred by not considering whether a lesser penalty was justified in appellant's case. The Board pointed out that insubordination was a serious offense, but noted that the sustained specification in appellant's case—that appellant disregarded a directive about typing addresses—was a minor instance of insubordination. Therefore, the Board determined that a 14-day suspension was a reasonable penalty in appellant's case. Accordingly, the Board affirmed the initial decision as modified. It ordered the agency to cancel the 30-day suspension and substitute a 14-day suspension.

GARY B. PUMPHREY v. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS (Docket No. SF07528111040)
February 18, 1983

1.343; 1.400; 1.410; 1.513; 4.128; 4.200; 4.300; 6.120

The agency suspended appellant for 25 days for making false statements regarding official business and for thereby compromising the integrity required in his position of criminal investigator. Appellant appealed the suspension to the Board's regional office, and the agency subsequently reduced the penalty to a 14-day suspension. Even though the agency's action rendered appellant's suspension a short-term suspension outside the Board's jurisdiction, the presiding official continued to process the appeal, as was proper under 5 U.S.C. §7512(2).

Although the presiding official determined that appellant had made false statements, he found that the agency failed to prove that appellant breached his responsibilities regarding the integrity required of his position. Further, the presiding official found that although the agency erred in disqualifying appellant's representative, appellant did not suffer harmful error because of this. The presiding official sustained appellant's suspension.

In a petition for review, appellant contended that the agency failed to identify which of appellant's statements were intentionally false. Citing *Smith v. Department of the Interior*, MSPB Docket No. DA075209129 (December 29, 1981), the Board explained that an agency, in stating charges against an employee, "must be sufficiently specific to enable the employee to respond." The Board determined that the agency fulfilled this general rule in appellant's case when it identified the categories of questions it be-

lieved appellant answered falsely, as well as the statements made by appellant which the agency deemed lacked candor. The Board, adding that appellant was able to respond to the charges in his comprehensive reply, could not agree with appellant that the agency was not specific enough in stating its charges. The Board also considered appellant's contention that the agency failed to prove that his statements "were objectively and intentionally false." Citing *Tucker v. United States*, 624 F.2d 1029 (Ct. Cl. 1980), the Board explained that the agency's use of circumstantial evidence to establish appellant's intent was acceptable. It noted that the record supported the presiding official's finding that appellant was not truthful about not remembering specific events.

Appellant argued that the 25-day suspension was an unreasonable penalty. Noting that the agency reduced the penalty to a 14-day suspension, the Board found such penalty reasonable in light of the seriousness of the charges against appellant. The Board affirmed the initial decision as modified, ordering the agency to cancel the 25-day suspension and to substitute a 14-day suspension.

JOSEPH E. STRONKO v. DEPARTMENT OF THE TREASURY (Docket No. AT07528010252)
February 24, 1983

1.410; 10.1214; 10.1321; 14.400

Appellant was suspended for 30 days for unauthorized use of a government vehicle and for conduct unbecoming a secret service agent. When appellant appealed to the Board's regional office, the presiding official affirmed the agency's action, but mitigated the penalty to 30 days leave without pay (LWOP), based upon appellant's outstanding work record. Both the agency and appellant petitioned for review.

Citing *Douglas v. Veterans Administration*, 5 MSPB 313 (1981), the Board explained that while it reviews an agency's action to assure that the agency used good judgment, it does not use the review function to displace the agency's managerial responsibilities. The Board pointed out that in appellant's case, the presiding official found that the agency exercised reasonable judgment, yet still substituted his judgment as to what was reasonable when he substituted LWOP for the penalty chosen by the agency. The Board further noted that although the presiding official mitigated appellant's penalty, this LWOP penalty would have the same disciplinary effect as imposing a suspension.

The Board found that the presiding official failed to apply 31 U.S.C. §638a(c)(2), which identifies suspension as the statutory minimum penalty for misuse of a government vehicle. Accordingly, the Board found

that the agency imposed the appropriate penalty when it suspended appellant for 30 days. The Board therefore affirmed the initial decision as modified and sustained the agency's action.

ATTORNEY FEES

JAMES S. CHAVEZ v. U.S. POSTAL SERVICE
(Docket No. DA07528210008ADD)
February 15, 1983

14.500; 14.520; 14.525

The agency petitioned for review of an addendum decision awarding appellant attorney fees. According to the record, the agency indefinitely suspended appellant after he was arrested and indicted on 16 counts of sexual abuse of minors. In the initial decision, the presiding official found that the agency supported its charge, but that it failed to establish nexus between appellant's off-duty conduct and the efficiency of the service. Accordingly, he reversed the suspension, and appellant filed a motion for attorney fees. The presiding official granted the motion, determining that the agency knew or should have known that it could not prevail on the merits.

Citing *Allen v. U.S. Postal Service*, 2 MSPB 582 (1980), the Board explained that according to 5 U.S.C. §7701(g)(1), attorney fees "in the interest of justice" are warranted in several circumstances, including when the agency action was "clearly without merit" or when the agency should have known that it would not prevail when it initiated the proceeding. The Board addressed the presiding official's determination that the agency should have known that it would not prevail on the merits, noting that the presiding official so determined because he found that the agency had not established nexus. The Board explained that negligence in preparing a case may prevent an agency from prevailing. However, it did not detect such negligence here, and could not agree with the presiding official's finding that the agency knew it could not prevail. The Board also noted that the agency established reasonable cause to believe that appellant had committed a crime for which he could be imprisoned.

Noting that appellant's indictment had received newspaper coverage, that his conduct was discussed by his coworkers, and that the agency also employed the stepfather of the children involved in the incidents, the Board determined that appellant's conduct would negatively affect the efficiency of the service. Accordingly, the Board found that granting appellant attorney fees was not in the interest of justice and, therefore, reversed the addendum decision.

EMPLOYMENT PRACTICES

WILLIAM R. MORRIS v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. SF300A00001)

February 22, 1983

4.112; 4.124; 4.210; 4.211; 18.000000

The Board reopened appellant's case to determine what was the minimal showing the Office of Personnel Management (OPM) "can and must make to establish by a preponderance of the evidence that the employment practice at issue is based on the requisite job analysis."

The Board explained that OPM Handbook X-118 indicated that the requirement for a GS-800 professional engineering position was either a bachelor's degree in engineering, state registration as a professional engineer, or "demonstrated eminence in the specialty field." The handbook further explained that the qualification of eminence in the specialty field is fulfilled when "the nature and necessary quality of [the applicant's] record of engineering leadership would typically qualify the candidate at the GS-15 grade level in the Federal Service."

According to the record, when appellant applied for several GS-11/12 engineering positions, OPM—finding that he did not meet the qualifications specified in the X-118—rated him ineligible. Consequently, appellant expressed objection to the use of GS-15 qualifications as a reference point for determining eligibility for GS-11/12 positions. In considering this matter, the Board explained that Part 300 of 5 C.F.R. requires a job analysis for each employment practice. The Board stated that such analysis identifies the duties, the knowledge and skill required to perform the duties, and factors for evaluating candidates. For the employment practice in question, the Board noted that OPM relied solely on an affidavit of the director of its Standards Development Center. Such affidavit claimed that the employment practice was developed "by professional staffing specialists who were knowledgeable concerning the duties and responsibilities of Federal engineering positions," based on "a thorough knowledge of the engineering positions in the Federal Government as developed by the analysis of those positions from the various Federal agencies that employ those professionals."

Though OPM pointed out that appellant failed to offer evidence refuting its information about the development of the employment practice, the Board found OPM's argument to be without merit. The Board noted that an appellant's only responsibility in a Part 300 case is to set forth his belief that an employment practice applied to him violated Part 300. The Board added that "all the evidence which is relevant to the

finding of whether a requisite job analysis took place is peculiarly within the knowledge and control of OPM." Further, the Board noted that the "Federal Personnel Management Supplement 271-1" required OPM to keep a record to support the development of a qualification standard.

Based on applicable regulations and requirements, the Board found that OPM submitted insufficient evidence to show that a job analysis was performed for the employment qualification in question. Accordingly, the Board reversed the initial decision and ordered OPM to reevaluate appellant's eligibility for the engineering position without considering the "eminence" standard.

BOARD ORDERS

OTHER ISSUANCES

ACKER, Larnardo M. v. General Services Administration (Docket No. DC07528210375ADD; February 22, 1983) 10.131; 10.810; 14.500

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HAYES, Brett T. and MILLER, James E. v. Department of the Air Force (Docket No. DA07528090220ADD; February 9, 1983) 1.110; 4.125; 14.520; 14.530; 14.540; 14.550

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KULLING, David L. v. Federal Aviation Administration (Docket No. CH07528210378; February 8, 1983) 6.120; 6.124; 10.12111

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REICO, Patricia S. v. Office of Personnel Management (Docket No. SF831L8210403; February 9, 1983) 10.1322; 15.13112

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- MELLEN, Richard L. v. Department of Transportation, Federal Aviation Administration (Docket No. AT075281F0928; February 3, 1983) (See ABBOTT, Noel W.)

- MEYERS, Robin L. v. Department of Transportation, Federal Aviation Administration (Docket No. AT075281F2177; February 3, 1983) (See ABBOTT, Noel W.)
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- SITTIG, Nancy G. v. Department of Transportation, Federal Aviation Administration (Docket No. AT075281F2330; February 3, 1983) (See ABBOTT, Noel W.)
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- SMITH, Robert A. v. Department of Transportation, Federal Aviation Administration (Docket No. AT075281F2206; February 3, 1983) (See ABBOTT, Noel W.)

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TURNER, Charles T. v. Department of Transportation, Federal Aviation Administration (Docket No. AT075281F2553; February 3, 1983) (See ABBOTT, Noel W.)

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WILLEY, Arnold E. v. Department of Transportation, Federal Aviation Administration (Docket No. AT075281F2222; February 3, 1983) (See ABBOTT, Noel W.)

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WRIGHT, Carl D. v. Department of Transportation, Federal Aviation Administration (Docket No. AT075281F2226; February 3, 1983) (See ABBOTT, Noel W.)

ZOBEL, Ben H. v. Department of Transportation, Federal Aviation Administration (Docket No. AT075281F2299; February 3, 1983) (See ABBOTT, Noel W.)

ASSIGNED TO AN ADMINISTRATIVE LAW JUDGE

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KENNEDY, Kathleen A. v. General Services Administration (Docket No. SF07528310148; February 10, 1983)

SAKELLRIOS, Angelos v. Department of Housing and Urban Development (Docket No. BN07528210183; February 8, 1983)

VANCE, Larkin B., III v. U.S. Postal Service (Docket No. DA07528310151; February 10, 1983)

WALKER, Aleece J. v. General Services Administration (Docket No. SF07528310177; February 10, 1983) (See KENNEDY, Kathleen A.)

YIAKIS, Joseph P. v. General Services Administration (Docket No. SF07528310163; February 10, 1983) (See KENNEDY, Kathleen A.)

EXTENSION OF TIME

SPECIAL COUNSEL v. Guadalupe Saldana (Docket No. HQ12068210023; February 10, 1983)

STAY GRANTED

SPECIAL COUNSEL (Charles F. Bohn) v. Federal Aviation Administration (Docket No. HQ12088310007; February 28, 1983)

MOTIONS GRANTED OR DENIED

CAMPBELL, Rex B. v. Department of Transportation, Federal Aviation Administration (Docket No. SF075281F3401; February 9, 1983)

FORMER AIR TRAFFIC CONTROLLERS REPRESENTED BY RICHARD J. LEIGHTON v. Department of Transportation, Federal Aviation Administration (Docket No. HQ12008310001; February 3, 1983)

FORMER COMMUNITY SERVICES ADMINISTRATION EMPLOYEES v. Department of Health and Human Services (Docket No. HQ03518110063; February 7, 1983)

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NOTES ON KEY NUMBERS

In each issue, summarized Board orders, as well as other issuances listed under "Board Orders," are indexed according to the key number system used in the published volumes, *Decisions of the United States Merit Systems Protection Board*. The index numbers, which indicate the subjects found in the decision, are listed after the order date. There are 18 main subject areas. These are described under "Major Topics and Scope Notes." The "Outline of Topics" divides each major topic into more specific subtopics.

MAJOR TOPICS AND SCOPE NOTES

Topic

1.000000 ADVERSE ACTIONS

Certain personnel actions are designated as "adverse actions" under Chapter 75 of the Civil Service Reform Act of 1978. This topic references Board opinions relating to the substantive law governing those actions and distinguishes other personnel actions not designated as "adverse actions" under Chapter 75. This topic also encompasses cases involving Board consideration of penalties in adverse action cases including the mitigation of penalties. Board cases concerning procedures governing adverse actions are located under *Practice and Procedure* (10.000000), and opinions relating to jurisdictional matters have been placed under *Jurisdiction* (6.000000). Cases regarding remedies available to the Board in adverse action cases are located in *Remedies* (14.000000).

2.000000 CONSTITUTIONALITY

This topic references opinions in which the Board has considered constitutional aspects of cases before it. Included are claims pursuant to specific constitutional provisions, as well as claims derived from constitutional provisions, such as the right to privacy. Constitutional claims relative to discrimination are in *Discrimination* (3.000000).

3.000000 DISCRIMINATION

This topic refers to Board cases concerning the substantive law of prohibited discrimination pursuant to the Civil Service Reform Act of 1978. Also included

are cases relating to affirmative action and disparate treatment of similarly situated employees. Questions of evidence, jurisdiction, practice and procedure, and remedial action in discrimination cases are referenced in *Evidence* (4.000000), *Jurisdiction* (6.000000), *Practice and Procedure* (10.000000), and *Remedies* (14.000000), respectively.

4.000000 EVIDENCE

This topic references cases dealing with substantive rules of evidence employed by the Board, as well as cases concerning the harmful error standard in the Act. The Board is bound by statutory burdens of proof, and cases referencing the Board's interpretation of such burdens are also included here.

5.000000 FREEDOM OF INFORMATION, PRIVACY, AND SUNSHINE ACTS

This topic references Board cases relating to the Freedom of Information, Privacy, and Sunshine Acts.

6.000000 JURISDICTION

This topic includes cases in which the Board has made specific reference to jurisdiction under the Civil Service Reform Act of 1978, as well as cases dealing with issues of justiciability. Since the jurisdiction of the Board differs with respect to certain entities, this topic includes cases dealing with jurisdictional questions particularly related to such entities. Included also are Board cases dealing with its enforcement power, which is a matter of continuing jurisdiction, and cases under the Act's savings provision. Jurisdiction over appeals related to retirement is covered under *Retirement* (15.000000).

7.000000 LABOR-MANAGEMENT RELATIONS

This topic contains cases arising under Title VII of the Act, including collective bargaining issues and the rights of individual employees. Title VII grievance procedure cases brought before the Board are also located under this topic.

8.000000 PARTICULAR EMPLOYMENT CATEGORIES

The Civil Service Reform Act of 1978 has provisions specifically applicable to certain categories of employees. This topic references cases in which the special procedural and substantive law applicable to such employee categories were discussed by the Board, and in which such special provisions were ger-

mane to the resolution of the case. Included are cases dealing with the merit pay provisions of the Act and the Senior Executive Service.

9.000000 PERFORMANCE RELATED ACTIONS

This topic references cases dealing with performance related actions under Chapter 43 of the Act, including procedural rights and standards of proof under Chapter 43, where performance appraisal systems have been implemented. Also included are cases dealing with performance appraisal actions under Chapter 75, where Chapter 43 appraisal systems have not yet been implemented.

10.000000 PRACTICE AND PROCEDURE

This is the major topic referencing cases which set out the procedural rules for matters before the Board, its administrative law judges, and its presiding officials. Matters such as timeliness and technical filing rules are included here, as well as the concepts of former adjudication and representation of parties.

11.000000 PROHIBITED PERSONNEL PRACTICES

The Civil Service Reform Act of 1978 lists merit systems principles governing the Federal work force and defines prohibited personnel practices that may not be taken against Federal employees. This topic is limited to cases in which the Board has interpreted these provisions and related matters.

12.000000 REDUCTIONS IN FORCE

This topic refers to Board cases dealing with reductions in force, including agency justifications for taking such actions and the substantive and procedural rights of employees affected.

13.000000 REGULATION REVIEW

The Civil Service Reform Act of 1978 empowers the Board to review regulations promulgated by the Office of Personnel Management and implementing regulations of other agencies. This topic references Board opinions dealing with such regulation review.

14.000000 REMEDIES

This topic references Board cases dealing with the remedial powers of the Board.

15.000000 RETIREMENT

This topic refers to Board cases involving issues relating to the retirement of Federal employees.

16.000000 SPECIAL COUNSEL

This topic references Board cases relating to the Office of Special Counsel, including the prosecution of Hatch Act cases and violations of the Federal Employees Flexible and Compressed Work Schedules Act. The filing requisites for complaints before the Special

Counsel are included here, while procedural requisites in Special Counsel cases before the Board are in *Practice and Procedure (10.000000)*.

17.000000 SUITABILITY AND FITNESS FOR DUTY EXAMINATIONS

This topic references cases dealing with issues of suitability. Included also are cases involving fitness-for-duty examinations.

18.000000 EMPLOYMENT PRACTICES

This topic references cases concerning the substantive law governing employment practices and distinguishes employment restrictions that are not appealable employment practices.

OUTLINE OF TOPICS

(With Key Numbers)

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1.100 ACTIONS CONSIDERED ADVERSE UNDER 5 U.S.C. 7512

- 1.110 Removal**
- 1.111 Involuntary Resignation or Retirement
- 1.120 Suspension for more than 14 days**
- 1.121 Enforced Leave
- 1.130 Reduction in Grade**
- 1.131 Involuntary Demotion
- 1.140 Reduction in Pay**
- 1.150 Furlough of 30 days or less**
- 1.160 Adverse Action by Office of Personnel Management**

1.200 ACTIONS NOT CONSIDERED ADVERSE UNDER 5 U.S.C. 7512

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FOR YOUR INFORMATION

DIGEST

The DIGEST is a monthly publication containing summaries of Board orders and a list of other Board orders and issuances. It is available from the Superintendent of Documents, under stock number 062-000-80001-1, either by subscription or single issue. Please address subscription or purchase inquiries to: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

INITIAL DECISIONS

Initial decisions made in the regional offices are available on microfiche. The microfiche and its indexes may be viewed in the library at the Board's central office. To subscribe to the microfiche "Federal Employee Appeals Decisions" at \$150 per year for microfiche and index, contact the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

PUBLISHED BOARD DECISIONS AND INDEX

Decisions of the United States Merit Systems Protection Board, volumes 1 through 7, covering the period January 11, 1979 through September 30, 1981, have been published. These volumes are a compilation of final actions taken by the Board and precedential interlocutory decisions. These issuances are indexed according to the Board's key number system.

Volumes 5, 6, and 7, each including a multi-part index, are available from the Superintendent of Documents for \$40 for the three-volume set. These volumes cover the period January 1, 1981 through September 30, 1981, and their stock number is 062-000-00011-2. However, volumes 1 through 4, which cover the period January 11, 1979 through December 31, 1980, are no longer in print.

BOARD ORDERS

All initial decisions, Board orders and opinions, and indexes may be viewed in the Information Services Division, Office of the Secretary. Copies of specific decisions or orders may be obtained by sending a written request to the Information Services Division, Merit Systems Protection Board, Suite 1404, 5205 Leesburg Pike, Falls Church, Virginia 22041. Requests should include the appellant's name, the docket number, and the date of the decision or order.

FEDERAL REGISTER ISSUANCES

Reproduced below are the Board's Federal Register issuances for the month.

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Federal Register

Vol. 48, No. 25

Friday, February 4, 1983

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: This regulation amends the interim procedures of the Merit Systems Protection Board with respect to

discovery and subpoenas. This action provides a simplified procedure for discovery as an aid to parties in preparing their cases for hearing.

DATE: Effective February 4, 1983.

FOR FURTHER INFORMATION CONTACT: Charles J. Stanislav, (202) 653-8900.

SUPPLEMENTARY INFORMATION: On June 29, 1979, the Board published final regulations (44 FR 38342) implementing its adjudicatory responsibilities under the Civil Service Reform Act of 1978 (Pub. L. 95-454). After three years' experience adjudicating cases under those regulations, it was determined that the Board's procedures with respect to discovery and subpoenas should be changed for the purpose of clarification, and to recognize the willingness and ability of the parties and practitioners to proceed in an orderly and cooperative manner. Accordingly, on July 2, 1982, the Board published amended regulations which provided a more simplified procedure for the discovery and subpoena process. The amended regulations became effective upon publication (July 2, 1982) on an interim basis, to permit public comment and to provide for a period of testing before issuance of final amended regulations.

The Board received comments from various federal agencies and labor unions. These comments have been carefully considered by the Board and the Board has adopted, in whole or in part, the suggestions made. The comments received were supportive of the concept of direct discovery between the parties, establishing time limits, and distinguishing between parties and nonparties as provided for in the interim regulations. These final rules adopt suggestions which more clearly define the scope of discovery directed to nonparties generally; set time limits for initial and subsequent discovery based upon receipt; provide for objections to discovery and motions to compel; allow reasonable time for preparation for a hearing following discovery; and provide that a failure to deny a request for admission does not constitute a binding admission. Also, motions to quash may be filed by the parties as well as the person to whom directed, and may be served by any person of proper age and detachment.

Subpart B—Hearing Procedures for Appellate Cases

Discovery

Section 1201.71 Statement of purpose.

This paragraph has been revised to state that discovery is designed to enable a party to obtain relevant information needed for preparation of the party's case, rather than just the presentation of the case.

Section 1201.72 Explanation and scope.

Paragraph (a) has been revised to redefine relevant information, to avoid confusion and to eliminate unnecessary information.

Paragraph (b) has been revised to reflect that relevant information has been defined in paragraph (a) and to limit the scope of discovery directed to nonparties.

Paragraph (c) has been revised to add that a failure to deny a request for admission is not to be deemed to constitute a binding admission, in recognition of the fact that persons appearing before the Board need not be admitted to the bar.

Section 1201.73 Procedures governing discovery.

Paragraph (a) has been revised to apply only to a party.

Paragraph (b) has been revised to apply to nonparties, and to encourage attempts at voluntary cooperation before requesting Board assistance.

Paragraph (c)(1) has been revised to eliminate unnecessary words.

Paragraph (c)(2) has been revised to require that copies of a motion to compel be served on the other party and on the person from whom discovery was sought.

Paragraph (c)(2)(i) is revised to remove redundant words.

Paragraph (c)(2)(ii) is not changed.

Paragraph (c)(3) has been added to allow response to a motion to compel by the other party and by the person from whom discovery was sought.

Paragraph (d)(1) has been revised to set the time limits to initiate *initial* requests for discovery and to mark the

time from the Board's order rather than from the date of appeal.

Paragraph (d)(2) has been revised to require prompt response to a discovery request and to mark the time for response after receipt of the request, rather than the date of filing; and to establish a time limit for subsequent discovery requests.

Paragraph (d)(3) has been revised to correct grammatical errors.

Paragraph (d)(4) has been revised to set the time limit based upon receipt, rather than filing date, and to set time limits for filing an opposition to a motion to compel.

Paragraph (d)(5) has been revised to make grammatical corrections, and to provide for the completion of discovery within a reasonable time prior to the date set for the hearing.

Paragraph (d)(6) has been revised to permit the presiding official to alter the time limits for discovery upon a showing of good cause, provided the parties have 14 days after completion of discovery to prepare for the hearing, unless the parties do not object to less preparation time.

Section 1201.74 Orders for discovery.

Paragraph (a) has been revised for technical corrections.

Paragraph (b) has been revised for technical corrections.

Paragraph (c) has been added to provide that failure to comply may result in sanctions.

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Section 1201.75 This section has not been changed.

Subpenas

Section 1201.81(b) This section has not been changed.

Section 1201.82 Motions to quash.

This section has been revised to make grammatical corrections and for clarity.

Section 1201.83 Service.

This section has been revised to delete service by a U.S. Marshal or Deputy Marshal, and to describe who may serve a subpoena.

Section 1201.84 Return of service.

This section has been revised to delete reference to U.S. Marshals and Deputy marshals.

Section 1201.85 Enforcement.

This section has been completely revised to describe what is necessary to obtain enforcement.

Regulatory Flexibility Act

The Chairman, Merit Systems Protection Board, certifies that the Board is not required to prepare an initial or final regulatory analysis of this final rule, pursuant to section 603 or 604 of the Regulatory Flexibility Act, because of his determination that this rule would not have a significant economic impact on a substantial number of small entities, including small business, small organizational units, and small governmental jurisdictions.

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

Accordingly, the Merit Systems Protection Board amends 5 CFR by amending Part 1201, Subpart B, as follows:

PART 1201—PRACTICES AND PROCEDURES

Discovery

1. Section 1201.71 is revised to read as follows:

§ 1201.71 Statement of purpose.

Proceedings before the Board shall be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed for preparation of the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. The parties are expected to initiate and complete needed discovery with a minimum of Board intervention.

2. Section 1201.72, paragraphs (a), (b), and (c) are revised to read as follows:

§ 1201.72 Explanation and scope.

(a) *Explanation:* Discovery is the process apart from the hearing whereby a party may obtain relevant information from another person, including a party, which has not otherwise been provided.

Relevant information includes information which appears reasonably calculated to lead to the discovery of admissible evidence. This information is obtained for the purpose of assisting the parties in preparing and presenting their cases. The Federal Rules of Civil Procedure may be used as a general guide for discovery practices in proceedings before the Board. However, the federal rules shall be deemed to be instructive rather than controlling.

(b) *Scope:* Any person may be examined regarding any nonprivileged matter which is relevant to the issues involved in the appeal, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons having knowledge of relevant facts. Discovery requests to nonparties and nonparty federal agencies and employees are limited to information which appears directly material to the issues involved in the appeal.

(c) *Methods:* Discovery may be obtained by one or more of the methods provided under the Federal Rules of Civil Procedure, including: written interrogatories, depositions, production of documents or things for inspection or copying, and requests for admission addressed to parties. Failure to deny a request for admission shall not be deemed to constitute a binding admission.

3. Section 1201.73, paragraphs (a), (b), (c), and (d) are revised to read as follows:

§ 1201.73 Procedures governing discovery.

(a) Discovery from a party. A party seeking discovery from another party shall initiate the process by serving a request for discovery on the other party. The request for discovery shall—

(1) state the time limit for responding, as prescribed in § 1201.73(d), and

(2) in the case of a request for deposition of a party or an employee of a federal agency party, (i) shall specify the time and place of the taking of the deposition, and (ii) shall also be served on the person to be deposed.

When a request for discovery is directed to an officer or employee of a

federal agency party, the agency shall make the officer or employee available on official time for the purpose of responding to the request, and shall assist the officer or employee as necessary in providing relevant information that is available to the agency. For purposes of discovery under these regulations, a party includes an intervenor. (See 5 CFR 1201.4(f))

(b) Discovery from a nonparty including nonparty federal agencies. Parties are encouraged to attempt to obtain voluntary discovery from nonparties whenever possible. A party seeking discovery from a nonparty federal agency or employee shall initiate the process by serving a request for discovery on the nonparty federal agency or employee. Discovery from other nonparties may be initiated by serving a request for discovery on the nonparty directly. Absent such a request or upon failure to obtain voluntary cooperation, discovery from a nonparty may be obtained by a written motion directed to the presiding official, showing the relevance, scope and materiality of the particular information sought and, in addition in the case of a deposition, the date, time, and place of the proposed deposition. A ruling on the motion will be issued by an authorized official of the Board and will be served on the moving party together with a subpoena, if approved, directed to the individual or entity from which discovery is sought, specifying the manner and time limit for compliance. It shall be the responsibility of the moving party to serve or arrange for service of a Board-approved discovery request and subpoena on the individual or entity.

(c) Responses to discovery requests. (1) A party, or a federal agency which is not a party, shall answer a discovery request within the time provided by § 1201.73(d)(2), either by furnishing to the requesting party the information or testimony requested or agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request, and the reasons for objection.

(2) Upon the failure or refusal of a party to respond in full to a discovery request, or a nonparty to respond in full to Board-approved discovery, the requesting party may file with the presiding official a motion to compel. A copy of the motion shall be served on the other party and on any nonparty entity or person from whom the discovery was sought. The motion shall be accompanied by:

(i) A copy of the original request and a statement showing the relevancy and materiality of the information sought.

(ii) A copy of the objections to discovery or, where appropriate, a verified statement that no response has been received.

(3) The other party and any other entity or person from whom discovery was sought may respond to the motion to compel within the time limits set forth in (d)(4) below.

(d) Time limits.

(1) Initial requests or motions for discovery shall be initiated within 25 days after the date of issuance of the Board's order to the respondent to produce the agency file and response.

(2) A party or nonparty shall respond to a discovery request promptly, but not later than 15 days after receipt of the request or order of the Board. Any discovery requests following the initial request shall be served within 10 days of receipt of the prior response, unless otherwise directed.

Deposition witnesses shall give their testimony at the time and place stated in the request for deposition or in the subpoena, unless otherwise agreed by the parties.

(3) A motion to depose nonparties (along with a request for a subpoena) shall be submitted to the presiding official within the time limits set forth in paragraph (d)(1) above or as otherwise directed.

(4) A motion for an order compelling discovery shall be filed with the presiding official within 5 days of the expiration of the time limit for response when no response is received. * Opposition to a motion to compel must be filed with the presiding official within 5 days of receipt of the motion.

(5) Discovery shall be completed within the time designated by the presiding official, but no later than 65 days after the filing of the appeal. A different time limit may be set by the presiding official after due consideration of the particular situation, including the dates set for hearing and closing of the case record. In cases involving a hearing, discovery shall be completed 14 days prior to the date set for hearing, unless the parties consent to a later completion date.

(6) The time limits prescribed in this section may be altered by the presiding official upon a showing of good cause; however, even upon such a showing, the

presiding official should not normally permit discovery to be completed later than 14 days prior to the date set for hearing if a party objects thereto.

4. Section 1201.74, paragraphs (a) and (b) are revised and paragraph (c) added to read as follows:

§ 1201.74 Orders for discovery.

(a) *Motion for an Order Compelling Discovery.* Motions for orders compelling discovery and motions for appearance of nonparties shall be submitted to the presiding official in accordance with section 1201.73(c)(2) and (d)(4) above.

(b) *Content of Order.* Any order issued shall include, where appropriate:

(1) Provision for notice to the person to be deposed as to the time and place of such deposition;

(2) Such conditions or limitations concerning the conduct or scope of the proceedings or the subject matter as may be necessary to prevent undue delay or to protect a party or other individual or entity from undue expense, embarrassment or oppression;

(3) Limitations upon the time for conducting depositions, answering written interrogatories, or producing documentary evidence; and

(4) Other restrictions upon the discovery process as determined by the presiding official.

(c) *Noncompliance.* Failure to comply with an order compelling discovery may subject the noncomplying party to sanctions under 5 CFR 1201.43.

* * * * *

5. Section 1201.82 is revised to read as follows:

§ 1201.82 Motion to quash.

Any person to whom a subpoena is directed or any party may file a motion to quash or limit the subpoena, setting forth the reasons why the subpoena should not be complied with or why it should be limited in scope. This motion shall be filed with the presiding official.

(6) Section 1201.83 is revised to read as follows:

§ 1201.83 Service.

A subpoena may be served by any person at least 18 years of age who is not a party, including a private process server or other person authorized to serve process in actions brought in state courts of general jurisdiction or in federal courts.

7. Section 1201.84 is revised to read as follows: *

§ 1201.84 Return of service.

The person who has served the subpoena shall certify on the return of service that service was made (1) by delivery to the witness in person, (2) by registered or certified mail, or (3) by delivery to a responsible person (named) at the residence or place of

business (as appropriate) of the person to be served, and that the prescribed fees have been tendered or provided for.

8. Section 1201.85 is revised to read as follows:

§ 1201.85 Enforcement.

If a person has been served with a Board subpoena but fails or refuses to comply with its terms, the party seeking compliance may apply to the presiding official, orally or in writing for enforcement. The party shall present the return of service and, except where the witness was required to appear before the presiding official, shall submit affidavit evidence of the failure or refusal to obey the subpoena. The Board, pursuant to 5 U.S.C. 1205(c), may then request the appropriate United States district court to enforce the subpoena.

Dated: January 27, 1983.

Herbert E. Ellingswood
Chairman.

Federal Register

Vol. 48, No. 30

Friday, February 11, 1983

5 CFR Parts 1204 and 1205

Freedom of Information Act; Privacy Act

AGENCY: Merit Systems Protection Board.

ACTION: Final rules.

SUMMARY: The Merit Systems Protection Board amends its regulations to set forth realistic charges for photocopy and search fees incurred in granting Freedom of Information Act and Privacy Act requests and to reflect changes in titles of "Field Offices" and "Chief Appeals Officers" to "Regional Offices" and "Regional Directors," respectively. **EFFECTIVE DATE:** February 11, 1983.

FOR FURTHER INFORMATION CONTACT: Kathy Semone, (202) 653-7200.

SUPPLEMENTARY INFORMATION: Under the Freedom of Information Act and the Privacy Act, the Merit Systems Protection Board may establish fees for photocopying documents to be released. 5 U.S.C. 552(a)(4)(A), 552a(f)(5). Additionally, under the Freedom of Information Act, fees may be charged for the time expended searching for documents. 5 U.S.C. 522(a)(4)(A). On July 2, 1982 (47 FR 28964), the Board published a proposed amendment to the

* This sentence was corrected to read as follows: "(4) A motion for an order compelling discovery shall be filed with the presiding official within 5 days of receipt of objections, or within 5 days of the expiration of the time limit for response when no response is received." (Federal Register, Vol. 48, No. 41, p. 8425, March 1, 1983).

rules to clarify the calculation of fees for photocopying, duplication of audio, video, and automated tapes, and postage costs; to account for partial hours of search time; to differentiate between clerical and professional employees' search time; to establish criteria for the administration of Freedom of Information Act fee waiver and reduction determinations; and to establish a time limit within which an appeal from an initial denial must be filed. No comments were received on the proposed rules.

The rules are hereby adopted as final, except as otherwise noted below. The Board has declined to establish regulatory criteria concerning fee waiver or reduction determinations under the Freedom of Information Act as proposed by § 1204.13(b). Subsequent to the Board's publication of the proposed regulations, the Department of Justice on January 7, 1983, issued government-wide guidance on the administration of fee waivers and reductions. In light of the criteria set forth within this guidance, the Board believes it would be inappropriate to publish further criteria. Accordingly, proposed § 1204.13(b) is adopted only to the extent that it provides for the waiver or reduction of fees by the Secretary or Regional Director when it is determined that furnishing the information will primarily benefit the general public.

The Board also has declined to establish a time limit within which an appeal from an initial denial of a Freedom of Information Act or Privacy Act request must be filed. This is in accord with the present statutory framework of both laws. Accordingly, proposed §§ 1204.21(c) and 1205.31(c) are not included in the final rule as adopted.

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In addition, by a separate notice published today, the Board has adopted interim regulations covering the charges imposed for photocopying performed by commercial duplication firms in conjunction with the Board's processing of requests under FOIA and the Privacy Act.

Regulatory Flexibility Act

The Chairman, Merit Systems Protection Board, certifies that the Board is not required to prepare an initial or final regulatory analysis of this rule change pursuant to section 603 or 604 of the Regulatory Flexibility Act, because of the determination that this rule would not have a significant economic impact on a substantial number of small entities, including small business, small organizational units, and small governmental jurisdictions.

List of Subjects

5 CFR Part 1204

Freedom of Information Act.

5 CFR Part 1205

Privacy Act.

Pursuant to 5 U.S.C. 1205(g), Parts 1204 and 1205 of Subchapter A of Chapter II of Title 5, Code of Federal Regulations, are amended as follows:

PART 1204—FREEDOM OF INFORMATION ACT

1. Paragraphs (a) and (c) of § 1204.11 are revised to read as follows:

§ 1204.11 Submission of request.

(a) *Place*. Requests for copies of records shall be made to the appropriate regional office of the Board, or the Office of the Secretary, Merit Systems Protection Board, Washington, D.C. If the requester has reason to believe the records in question are located in a regional office, it is appropriate to submit the request to that office. Requests to the region shall be addressed to the Regional Director at the appropriate regional office listed in Appendix II of 5 CFR Part 1201. Requests shall be made during normal business hours, or submitted by mail. Requests shall be in writing.

(c) *Payment*. Records usually will not be released until fees have been received, unless the fees are waived according to § 1204.13(a)(4) of this part.

2. Paragraph (d) of § 1204.12 is revised to read as follows:

§ 1204.12 Time limitations and determinations.

(d) *Determining Officials*. Determinations on requests shall be made by the Secretary of the Board or any Director of one of the Board regional offices.

3. Part 1204.13 is revised as follows:

§ 1204.13 Fees.

(a) Requests for records are subject to the following schedule of costs:

(1) *Duplication*. (i) Photocopies of records duplicated by the Board shall be subject to a charge of 10 cents per page.

(ii) Fees for Board duplication of audio, video, and automated tapes shall be charged at the actual cost to the Board.

(2) *Manual Records Search*. \$2.50 per quarter-hour if conducted by a clerical employee; \$5.00 per quarter-hour if conducted by a professional or managerial employee.

(3) *Postage*. Fees for postage shall be charged at the actual cost to MSPB.

(b) *Waiver or Reduction of Fees*. The Secretary or Regional Director shall waive or reduce a fee when it is determined that furnishing the information will primarily benefit the general public.

PART 1205—PRIVACY ACT

5. Paragraph (a) of § 1205.11 is revised to read as follows:

§ 1205.11 Submission of request.

(a) *Place*. Inquiries or requests for access to records shall be made to the appropriate regional office of the Board, or the Office of the Secretary, Merit Systems Protection Board, Washington, D.C. 20419. If the requester has a reason to believe the records in question are located in a regional office, it is appropriate to submit the request to that office. Requests to the region shall be addressed to the Regional Director at the appropriate regional office listed in Appendix II of 5 CFR Part 1201.

6. Paragraph (d) is added to § 1205.11 to read:

(d) *Payment*. Records usually will not be released until fees have been received.

7. Paragraph (d) of § 1205.12 is revised to read as follows:

§ 1205.12 Time limitations and determinations.
* * *

(d) Determining Officials.

Determinations on requests shall be made by the Secretary of the Board or by any Director of one of the Board regional offices.

8. Paragraph (b) of § 1205.16 is revised to read as follows:

§ 1205.16 Fees.
* * *

(b) Duplication. (1) Photocopies of records duplicated by the Board shall be subject to a charge of 10 cents per page.

(2) Fees for Board duplication of audio, video, and automated tapes shall be charged at the actual cost to the Board.

Dated: January 19, 1983.

For the Board.

Herbert E. Ellingwood,
Chairman.

5 CFR Parts 1204 and 1205

Freedom of Information Act; Privacy Act

AGENCY: Merit Systems Protection Board.

ACTION: Interim regulations; Request for comments.

SUMMARY: Due to a great increase in the number of Freedom of Information Act (FOIA) request for records, the Merit System Protection Board (MSPB) has found it necessary to arrange for the duplication of records made available under FOIA and the Privacy Act with commercial duplication firms. This document establishes the interim regulations which cover duplication fees when the Board had delegated the copying of Board records to commercial duplication firms.

DATES: Effective February 11, 1983. Comment date: Written comments should be submitted on or before March 14, 1983.

ADDRESS: Comments should be addressed to Legal Publication Division, Office of the Secretary, Merit Systems Protection Board, 5205 Leesburg Pike, Suite 1404, Falls Church, Virginia 22041.

FOR FURTHER INFORMATION CONTACT: Kathy Semone, (202) 653-7200.

SUPPLEMENTARY INFORMATION: Under the Freedom of Information Act (FOIA) and the Privacy Act, the Merit Systems Protection Board may establish fees for the duplication of documents to be released. 5 U.S.C. 552(a) (4) (A), 552a(f) (5). On July 2, 1982, the Merit Systems Protection Board published proposed rules to establish, in part, a new schedule of fees with respect to the duplication of records released pursuant to the FOIA and Privacy Act. Since that time the Board has received a greatly increased number of FOIA requests for records, notably Board appeal files and hearing transcripts. As a result, the

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Board has found it necessary to arrange with commercial duplication firms for the duplication of records made available under the FOIA and Privacy Act.

By this notice the Board adopts regulations for interim effect covering FOIA and Privacy Act duplication fees when the Board had delegated the copying of the Board records to commercial duplication firms selected by the Board. These duplication firms have been selected on the basis of overall, cost and best service to the public. Their fees for copying may include a reasonable factor for overhead and profit. However, such fees shall not exceed the fees which the Board would be authorized to charge had it processed the request itself. The Board will continue to rule on all FOIA and Privacy Act requests, but where the Board has delegated the copying of records to commercial duplication firms, payment for such duplication shall be made directly by the requesters to the commercial firm. Likewise, delivery of the requested records shall be made by the commercial firm.

A list of the commercial duplication firms and their respective charges is available upon request from the Office of the Secretary, Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419 (202-653-7200) and the Board's Regional Offices, whose addresses are listed in Appendix II of the Board's regulations at 5 CFR Part 1201 (1982).

The Board has found that good cause exists for publication of these regulations for interim effect due to the overwhelming receipt of FOIA and Privacy Act requests for copies of records related to air traffic controller appeals currently being adjudicated by the Board.

In separate final regulations also published today, the Board has adopted the remainder of its schedule of fees for the duplication of records released under the FOIA and Privacy Act.

Regulatory Flexibility Act

The Chairman, Merit Systems Protection Board, certifies that the Board is not required to prepare an initial or final regulatory analysis of this rule pursuant to section 603 or 604 of the Regulatory Flexibility Act because of the determination that this rule would not have a significant economic impact on a substantial number of small entities, including small business, small organizational units, and small governmental jurisdictions.

List of Subjects

5 CFR Part 1204

Freedom of Information Act.

5 CFR Part 1205

Privacy Act.

Pursuant to 5 U.S.C. 1205(g), Parts 1204 and 1205 of Subchapter A of Chapter II of Title 5, Code of Federal Regulations, are amended as follows:

PART 1204—FREEDOM OF INFORMATION ACT

Section 1204.13 is amended by adding paragraph (a)(1)(iii) to read as follows:

§ 1204.13 Fees

(a) * * *

(iii) The Board, at its option, may delegate the duplication of Board records to commercial firms selected by the Board. These firms have been selected on the basis of overall cost and best service to the public. Duplication shall be subject to fee schedules established by the Board with the firms.

Such fees may include a reasonable factor for overhead and profit. Payment for copies shall be made directly by the requester to the commercial firm. However, the fees shall not exceed the fees which the Board would be authorized to charge had it processed the request itself.

PART 1205—PRIVACY ACT

5 CFR 1205.16 is amended by adding paragraph (b)(3) to read as follows:

§ 1205.16 Fees.

(b) . . .

(3) The Board, at its option, may delegate the duplication of Board records to commercial firms selected by the Board. These firms have been selected on the basis of overall cost and best service to the public. Duplication shall be subject to fee schedules established by the Board with the firms. Such fees may include a reasonable factor for overhead and profit. Payment for copies shall be made directly by the requester to the commercial firm. However, the fees shall not exceed the fees which the Board would be authorized to charge had it processed the request itself.

Dated: January 19, 1983.

For the Board.
Herbert E. Ellingwood,
Chairman.

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DEFINITIONS

These definitions are provided for clarification purposes only and are not intended to convey the strict legal meaning of the term.

Deciding Official—the official who renders the agency's decision.

Regional Office—the Board office authorized to receive appeals from the area where the appellant's duty station was located when the agency action was taken; there are 11 MSPB regional offices.

Initial Decision—the regional office decision made by the presiding official in response to a petition for appeal. The initial decision becomes final in 35 days unless a petition for review is filed with the Board and granted. In that case, the Board's decision becomes the final decision. If the petition for review is denied, the initial decision becomes final five days after the issuance of the denial.

Petition for Appeal—the request filed with a Board regional office for review of an agency action.

Petition for Review—the request filed with the three-member Board in Washington, D.C., for review of an initial decision of a presiding official.

Presiding Official—any person designated by the Board to preside over any hearing or to make a decision on the record. The presiding official referred to in the DIGEST summaries is usually a Board regional office official designated by the Board to perform these duties.

Proposing Official—the agency official who initiates an action to be taken against an employee.

Addendum Decision—an addendum decision deals with attorney fees.

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